

A HARRAH'S OPERATING COMPANY INC

v.

WU YUN SHYA JOSEPHINE

B COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NOS: S-02-306-2004 & S-02-987-05]
C 21 APRIL 2008

CIVIL PROCEDURE: *Stay of proceedings - Forum non conveniens - Gaming contract made abroad - Loan - Recovery action - Whether trial judge failed to apply relevant principles for stay application - Enforcement of judgment*

BETTING, GAMING AND LOTTERY: *Gaming - Gaming contracts - Gaming contract made abroad - Loan - Recovery action - Stay of proceedings - Forum non conveniens - Whether trial judge failed to apply relevant principles for stay application - Enforcement of judgment*

CONTRACT: *Gaming contract - Gaming contract made abroad - Loan - Recovery action - Stay of proceedings - Forum non conveniens - Whether trial judge failed to apply relevant principles for stay application - Enforcement of judgment*

F The plaintiff/appellant had brought an action to recover a loan
granted to the defendant/respondent amounting to USD180,000.
The debt came about as a result of the respondent gambling and,
subsequently, losing at the appellant's casino situated in Nevada,
G United States of America. The appellant, in attempting to recover
the full sum owed, commenced the action at Kota Kinabalu,
Sabah instead of Nevada. The respondent thereafter took up a
stay action on the ground that Kota Kinabalu was not the proper
forum for trial of this matter. The High Court granted the stay
H order. The trial judge made a finding of fact that the loan granted
was a gaming transaction and as gaming was illegal in Malaysia,
the appellant was thus prevented from recovering the impugned
sum. The appellant, being dissatisfied with the decision, filed this
I appeal, contending that the judge had erred in not applying the
principles applicable for an application for stay of proceedings on
grounds of *forum non conveniens*, and had determined the application

on unrelated grounds. This appeal was heard with another appeal whereupon all parties agreed that the decision of this appeal would bind the other appeal.

Held (allowing the appeals)

Per Suriyadi Halim Omar JCA delivering the judgment of the court:

- (1) The judge erred when he made the issue of gambling as the central factor on route to granting the application (he had made findings of fact and assumptions regarding the factor of gambling at this stage, merely based on the bare assertions of the respondent. In fact, the reverse could also be true as controlled gambling does exist in Malaysia). It was clear that the special circumstance relied upon by the respondent for the order of stay of proceedings was that the Malaysian court was not the proper forum. The doctrine of *forum non conveniens* refers to the discretionary power of courts to decline jurisdiction when the convenience of parties and the ends of justice would be better served if the action were brought and tried elsewhere. It does not mean that the court before which the issue is being canvassed is not convenient and that some other court is more suitable. Regretfully, this special ground of *forum non conveniens* was not considered by the judge. By that failure, he had failed to consider the practical factors that could make a trial easy, expeditious and inexpensive in Nevada. With this error, it could not be said that the respondent had satisfied the court that some other forum was more suitable or appropriate. Since the appellant was entitled legally to commence its action in Malaysia, it would be quite unjust to confine the appellant to remedies elsewhere. It must be appreciated that the United States of America is not a signatory of the Reciprocal Enforcement of Judgments Act 1958 and, as such, a successful judgment there may not be easily enforced in Malaysia. The monumental problems that would befall the appellant if the matter were to go through some fresh legal process all over again in Malaysia merely to enforce that judgment would be costly, illogical and unjust. (paras 12, 13, 14, 15, 20 & 21)

A ***Bahasa Malaysia Translation Of Headnotes***

- Plaintif/perayu telah memfail tindakan untuk mendapat kembali pinjaman yang diberikan kepada defendan/responden berjumlah USD180,000. Punca hutang adalah kerana responden berjudi dan kalah di kasino perayu yang terletak di Nevada, Amerika Syarikat.
- B Dalam usaha untuk mendapat kembali jumlah penuh hutang, perayu telah memulakan tindakan di Kota Kinabalu, Sabah dan tidak di Nevada. Berikutnya, responden mengambil tindakan penggantungan atas alasan bahawa Kota Kinabalu bukan forum sesuai untuk membicarakan kes. Perintah penggantungan
- C dibenarkan oleh Mahkamah Tinggi, dengan yang arif hakim membuat rumusan fakta bahawa pinjaman yang diberi adalah transaksi judi dan oleh kerana perjudian diharamkan di Malaysia, maka perayu dihalang dari mendapat kembali jumlah tersebut.
- D Tidak berpuas hati, perayu memfailkan rayuan di sini sambil berhujah bahawa yang arif hakim khilaf kerana tidak memakai prinsip-prinsip yang terpakai dalam prosiding permohonan penggantungan atas alasan *forums non conveniens*, dan memutuskan permohonan atas alasan-alasan yang tidak berkaitan. Rayuan ini
- E didengar bersekali dengan satu rayuan lain di mana pihak-pihak bersetuju bahawa keputusan rayuan ini akan mengikat rayuan yang kedua tersebut.

Diputuskan (membenarkan rayuan-rayuan)

F **Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:**

- (1) Hakim khilaf bilamana beliau menjadikan isu judi sebagai faktor terpenting dalam membenarkan permohonan (beliau membuat dapatan fakta dan andaian berkaitan faktor judi di peringkat ini, semata-mata berdasarkan pengataan tanpa bukti responden.
- G Namun, realiti mungkin sebaliknya kerana perjudian dikawal wujud di Malaysia). Adalah jelas bahawa halkeadaan istimewa yang menjadi pergantungan responden bagi mendapatkan perintah penggantungan prosiding adalah bahawa mahkamah
- H Malaysia bukan merupakan forum sesuai. Doktrin *forum non conveniens* merujuk kepada kuasa budibicara mahkamah untuk menolak bidangkuasa dalam keadaan di mana penyelesaian pihak-pihak dan kemaslahatan keadilan akan lebih dapat dicapai jika tindakan dibawa dan dibicarakan di tempat lain. Ia tidak
- I bermakna bahawa mahkamah di mana isu tersebut dihujah tidak sesuai dan bahawa satu mahkamah lain lebih sesuai.

Malangnya, alasan istimewa *forum non conveniens* ini tidak dipertimbang oleh hakim. Dengan kegagalannya ini, beliau telah gagal mempertimbangkan faktor-faktor praktikal yang akan menjadikan perbicaraan itu lebih senang, cepat dan murah di Nevada. Dengan kesilapan ini juga, maka ianya tidak boleh dikatakan bahawa responden telah memuaskan mahkamah bahawa satu forum lain adalah lebih sesuai dan lebih wajar. Oleh kerana perayu berhak di sisi undang-undang untuk memulakan tindakannya di Malaysia, maka adalah tidak adil untuk memaksanya mendapatkan remedi di tempat lain. Harus diingat bahawa Amerika Syarikat bukan penandatanganan kepada Akta Penguatkuasa Salingan Hukuman 1958, dan kerana itu, suatu penghakiman yang berjaya di sana tidak dapat dikuatkuasakan dengan mudah di Malaysia. Masaalah besar yang akan menimpa perayu jika perkara ini terpaksa melalui proses undang-undang sekali lagi semata-mata untuk melaksanakan penghakiman adalah bahawa ianya melibatkan kos yang tinggi, tidak logik dan tidak adil.

Case(s) referred to:

American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC (*refd*)
MacShannon v. Rockware Glass Ltd [1978] AC 795 (*refd*)
Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1979] 1 LNS 60 FC (*refd*)
Spiliada Maritime Corporation v. Cansulex Ltd [1987] AC 460 (*refd*)
Zapata Off-Shore Co v. The Bremen and Unterweser Reederei GMBH (The Chaparral) [1972] US CT 315 (*refd*)

Legislation referred to:

Civil Law Act 1956, s. 26
 Courts of Judicature Act 1964, s. 23(1)
 Rules of the High Court 1980, O. 18 r. 19(1)

(Civil Appeal No: S-02-306-2004)
 For the appellant - Datuk Douglas Lind; M/s Lind Willie Wong & Chin
 For the respondent - Raymond Szetu (Baldev Singh with him); M/s Baldev Gan & Assoc

(Civil Appeal No: S-02-987-05)
 For the appellant - Datuk Douglas Lind; M/s Lind Willie Wong & Chin
 For the respondent - Lim Hock Leng; M/s Lim Guan Singh & Co

[Appeals from High Court, Kota Kinabalu; Civil Suit Nos: K-22-258-2002 & K-22-47-2004]

Reported by Suresh Nathan

A

JUDGMENT

Suriyadi Halim Omar JCA:

B [1] This appeal was heard with another appeal ie, S-02-987-05 (hereinafter referred to as the second appeal) whereupon all parties had agreed that the decision of this appeal would bind that second appeal. At the end of this appeal we had unanimously allowed this appeals with costs whereupon the High Court's order in this case and the order in the second appeal were set aside. Deposits were ordered to be returned to the appellants.

C

D [2] Since parties had agreed to be bound by the decision of this appeal I need only reproduce the facts of this appeal, and as agreed, equally applicable for the second appeal. The plaintiff (hereinafter referred to as the appellant) had brought an action to recover a loan granted to the defendant (hereinafter referred to as the respondent) amounting to US180,000. This sum owed came about in this manner:

E [3] The respondent had affirmed that she had been contacted by one Niki Wong, a Singaporean, to gamble at the appellant's premises at Nevada, in the United States of America. Upon arrival at the appellant's casino she was granted certain facilities, under which arrangement the respondent was given tokens to place her bets. These tokens could not be used anywhere else. To be F entitled to those tokens the respondent had to sign certain documents or colloquially known as markers.

G [4] The respondent lost subsequently in the gambling session. The appellant thereafter attempted to recover the said full sum of US180,000 as a debt with the above markers as evidence. Instead of taking up the recovery action in Nevada the action was commenced at Kota Kinabalu, Sabah. The respondent thereafter took up a stay action on the ground that the Malaysian Court was not the proper forum. When filing that application the H respondent had stated that the claim would be tried with less expense and inconvenience in Las Vegas, with Kota Kinabalu not being the appropriate forum for trial of this matter.

I [5] In her affidavit in reply the respondent had knowingly agreed to the advancement for purposes of gambling and knew that she would be required to sign the documentation for the credit line. She merely claimed that she did not know the exact nature and

terms of the gaming agreement. She further asserted that the recovery action by the appellant was recovery of an alleged gaming debt pursuant to gaming agreements which were void and against public policy in Malaysia.

A

[6] In reply the appellant had contended that what was sought to be enforced was a claim for monies lent and not the enforcement of a gaming debt. The appellant in its affidavit in opposition, despite the assertion that the claim merely relates to recovery of a debt, saw it fit to make certain clarification when addressing the charges of the respondent. It asserted that gaming was legal in Nevada, America whilst the appellant was a duly licensed casino hotel and had the right to seek the enforcement of credit instruments which they represent. The appellant's assertion was that the credit instrument which represented a debt was valid and enforceable by legal process.

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[7] To arrive at this credit instrument stage the scenario will be as follows: The patron who wishes to make bets but wishes credit will have to submit his credit application first. Assuming that approval is granted the casino will provide chips or money usually upon the patron signing a counter-cheque or marker. The latter, which is computer generated, is used in place of a personal cheque. Each marker bears the following printed words:

E

For value received, I represent that the above amount is on deposit in said bank subject to this check and is hereby assigned Payee, and/ guarantee payment with exchange. I authorize completion, if necessary, by the Payee, of any missing amount, my bank account number, and the name, address and branch of my bank. I waive any right to stop payment and waive presentment, protest, and notice of dishonor. I further agree to pay all costs of collection including attorney's fees and that in any matter relating to this instrument, Nevada law will govern and jurisdiction is proper solely in Nevada.

F

G

[8] The appellant had contended that it was not seeking to enforce a gaming debt but the repayment of monies lent before any gaming took place.

H

[9] The respondent was able to succeed before the High Court judge and a stay order was granted. Being dissatisfied the appellant had filed this appeal. The appellant had complained that the learned judge had erred in not applying the principles

I

A applicable for an application for a stay of proceedings on the grounds of *forum non conveniens*, and had determined the application on unrelated grounds.

B [10] Having scrutinized the learned judge's grounds of judgment it was quite obvious that much of his attention, amongst others, had been grabbed by matters relating to gambling. He had written that s. 26 of the Civil Law Act was applicable, as decided in the case of *Ngui Mui Khin & Anor v. Gillespie Bros. & Co. Ltd* [1979] 1 LNS 60 in that "... any transaction taking place outside jurisdiction can only be enforced in the local courts if they are not contrary to the local laws and regulations". He had made a finding of fact that the loan granted was a gaming transaction, and as gaming was illegal in Malaysia the appellant thus was prevented from recovering the impugned sum. As parties had agreed to the exclusive jurisdiction of Nevada let alone trying the action in Malaysia would offend the sensitivities of almost all communities of Malaysia, as the majority of the citizenry were against gambling as reflected in the Malaysian laws, the stay was granted.

E [11] In open court we did mention our broad reasons for allowing the appeal to be as follows:

- F 1. Parties had agreed that the High Court of Sabah and Sarawak is not ousted to hear this case notwithstanding the markers' clauses on the factor of jurisdiction;
- G 2. The issue of *forum non conveniens* was not considered by the learned judge as conceded by the respondent;
3. With the choice having been made by the appellant to submit itself to the jurisdiction of the Sabah and Sarawak High Court, and with the respondent residing in Sabah, there was no good reason for the respondent to complain;
- H 4. The matter rests primarily on documents only and may not involve a large number of witnesses. Even if so that would be a problem for the appellant; and
5. In the interest of justice the forum of convenience would be the High Court of Sabah and Sarawak.

I [12] We were of the view that the learned judge was in error when he made the issue of gambling as the central factor on route to granting the application (He had made a finding of facts and

assumptions regarding the factor of gambling at this stage, merely based on the bare assertions of the respondent. In fact the reverse could also be true as it is universally known that controlled gambling does exist in Malaysia, be it at the Genting Highlands or at licensed premises).

[13] It was clear to all and sundry that the special circumstance relied upon by the respondent for the order of stay of proceedings was that the Malaysian Courts were not the proper forum. We now reproduce the summons in chambers in relation to the grounds:

... that the Plaintiff's action against the Defendant in this suit and all proceedings relating to it be stayed on the ground that Malaysian Courts are not the proper forum for the prosecution of the Plaintiff's claim on the principle of *forum non conveniens*.

[14] Despite such conspicuous clarity regrettably the learned judge had failed to touch on this supplied special circumstance. As we said above even the respondent had conceded that this issue of *forum non-conveniens* was not considered by the learned judge. This doctrine of *forum non conveniens* in a gist refers to the discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried elsewhere. The phrase does not mean that the court before which the issue is being canvassed is not convenient but that some other court is more suitable (*Black's Law Dictionary*). *Spiliada Maritime Corporation v. Cansulex. Ltd* [1987] AC 460 had accepted this doctrine which originated from Scotland when Lord Goff said:

... there is some other tribunal, having competent jurisdiction in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.

[15] Regrettably this special ground of *forum non conveniens* supplied by the respondent was not considered by the judge. By that failure he had failed to consider factors in the like of relative ease of access to sources of proof, availability of processes to ensure attendance of witnesses willing or unwilling, costs involved in that exercise, and all practical problems that could make a trial easy, expeditious and inexpensive in Nevada. With this error it cannot be said that the respondent had satisfied the court that some other forum was more suitable or appropriate.

- A [16] In fact, a further perusal of the judgment also showed that the judge had failed to consider whether the respondent was amenable to Nevada's jurisdiction, apart from not impressing him that some other forum was appropriate (*MacShannon v. Rockware Glass Ltd* [1978] AC 795 HL). Here the learned judge had instead
- B erroneously targeted the pros and cons of gambling as his main ground of allowing the application of stay.

- C [17] In the course of the appeal the respondent had submitted, in a gist, that parties had agreed at arms length the expectations of parties that only Nevada has the jurisdiction to resolve the matter. In support of its stance, the respondent had referred to the American case of *Zapata Off-Shore Co v. The Bremen and Unterweser Reederei G.M.B.H. (The Chaparral)* [1972] US CT 315. The court, *inter alia* had opined:

- D The correct approach was to enforce the clause unless the Plaintiffs would clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid eg, by reason of fraud. The threshold question is whether the Court should have exercised its jurisdiction to do more than give effect
- E to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

- F ... Whatever "inconvenience" Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do, was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in Court. Absent that there is no basis for
- G concluding that it would be unfair, unjust or unreasonable to hold that party to his bargain.

- H [18] With every respect to the above view, a perusal of the documents alluded to merely showed printed words which were hazy in contents, let alone yet to be established as admissible in law. How could such receipts, at best stand in the way of the entrenched statutory rights of the defendant promulgated under s. 23(1) of the Courts of Judicature Act 1964, by virtue of him being a resident of Malaysia. It takes more than hazy markers, which formed part of a contract, to circumvent a statutory right
- I emanating from the Federal Constitution to oust the Malaysian courts.

[19] On hindsight, if the respondent had strongly believed that the action of the appellant was an abuse of the process of the court because of the ouster clause in the markers, why go through the processes of a stay application, when a striking out action would have resolved the matter speedily. The relevant provision would be under O. 18 r. 19(1) of the Rules of the High Court 1980. He could have alleged that the appellant's action disclosed no reasonable action, scandalous, frivolous or vexatious, or an abuse of the process of the court. The fact that the respondent has not taken this route, or unreasonably demanded the case be heard at Nevada, jerks our suspicion that he was merely playing for time. He also had an ace in the Reciprocal Enforcement of Judgments Act 1958 as the United States of America is not a signatory to it (see below).

[20] As the appellant was entitled legally to commence its action in Malaysia, apart from the respondent having failed to satisfy the court that some other forum was more suitable or appropriate, it would be quite unjust to confine the appellant to remedies elsewhere. The source of that remark is the case of *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273, where after discussing the above case of *Spiliada Maritime Corp v. Cansulax Ltd*, Peh Swee Chin FCJ had added:

that in all cases of either a defendant's application for stay of proceedings ... it will be obligatory for a Malaysian court to consider in any event, a most important factor, ie, whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysian court considers all cases in connection with *forum non conveniens*.

[21] It must be appreciated that the United States of America is not a signatory of the Reciprocal Enforcement of Judgments Act 1958, and as such a successful judgment there may not be easily enforced in Malaysia. Imagine the monumental problems and sufferings that will befall the appellant if the matter were to go through some fresh legal process all over again in Malaysia merely to enforce that judgment. Apart from being costly it would be plainly illogical and unjust.

[22] It was based on all the above reasons that we allowed the appeal with costs.